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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

CHRISTOPHER J. NYGREN AND SHARON K. NYGREN,

PETITIONERS,

v.

MINNEAPOLIS PUBLIC SCHOOLS,
SPECIAL SCHOOL DISTRICT NO. 1, ET AL.

RESPONDENTS.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICUS CURIAE* CHILDREN'S LAW CENTER OF MINNESOTA IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE* AND SUMMARY OF THE ARGUMENT

Amicus Curiae Children's Law Center of Minnesota ("CLC") is a nonprofit organization whose mission is to promote the rights and interests of children, especially children of color and children with disabilities, in the judicial, child welfare, health care, and education systems.[1] As set forth in the accompanying letters, counsel for both parties have consented in writing to submission of this amicus brief.

CLC carries out its mission in two main ways: (1) by providing direct representation for children in the foster care system; and (2) by advocating and participating in state and national efforts to reform and improve the child protection and juvenile justice systems. CLC also recruits, trains, and provides consultation and support to volunteer lawyers who represent children.

Nationally, CLC is a member of the Working Group of the American Bar Association Section of Litigation Children Rights Litigation Committee that provides technical assistance in the development of children's legal programs around the country and encourages attorneys to do pro bono work for children. In addition, CLC is one of eight partners in the newly formed National Children's Law Center Network, focusing on education as a common national policy initiative, namely that all children have a right to be in school, in the right school, and to finish school. The right school means, among other things, a school that meets the special education needs of children like Petitioner, a brain injured child with impaired ability to control his behavior.

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[1] This brief was written entirely by counsel for amicus, as listed on the cover. No outside contributions were made to the preparation or submission of this brief.

Children have rights and legal protections, but they are not self-supporting. They need someone, first, to help them understand how their lives can be better and, second, to speak effectively on their behalf and promote their important interests. The services that CLC provides center on the rights of children to have a voice in their own future and to be secure in their person and environment.

Children in foster care often have special education needs, many with diagnoses of emotional and behavioral disabilities. In its representation projects, CLC obtains school records and works to ensure that individualized education programs are updated for children with special education needs.

CLC supports the Petition for Writ of Certiorari filed by the child Christopher Nygren and his mother Sharon Nygren. CLC submits this brief and urges reversal for two main reasons. (1) The Eighth Circuit's opinion focused solely on academic progress as measured by standardized tests to determine that Christopher had been given a free appropriate public education, ignoring that his individualized education program in third grade actually exacerbated his disability, by causing his emotional outbursts and behavioral disorders to escalate. This is a misinterpretation of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., and conflicts with decisions of this Court and of other circuit courts of appeal. (2) Christopher's individualized education program was contrary to Minnesota law, which strictly regulates the type of punitive, negative measures used to respond to Christopher's emotional outbursts. The Eighth Circuit's opinion thus fails to enforce the IDEA's requirement that a free appropriate public education conform to applicable state education standards. 20 U.S.C. § 1401(8)(B).

CLC urges this Court to grant review in order to consider the significant issues raised by the Eighth Circuit's decision, and the possible adverse effects on all of Minnesota's children with emotional and behavioral disabilities. To confine review of a school's individualized education plan for a disabled child solely to whether that child has made some academic progress, as the Eighth Circuit has done in this case, will deny all disabled children in Minnesota the benefit of the broader statutory definition of a free appropriate public education, as interpreted by this Court and other circuit courts. In addition, by refusing to enforce the governing state educational standards as required by the IDEA, the Eighth Circuit's decision may increase the unauthorized use of aversion and deprivation procedures in Minnesota schools.

ARGUMENT

This case raises important questions concerning the substantive educational benefits and procedural safeguards extended to all disabled children by the IDEA. The IDEA was enacted to ensure that, for all states accepting federal assistance under the Act, "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." 20 U.S.C. § 1412 (a)(1)(A); *see also* 20 U.S.C. § 1400 (d)(1)(A) (purpose of IDEA is to ensure all disabled children "have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living").

The IDEA expressly covers children like Christopher with emotional and behavioral disabilities. "'Child with a

disability' means a child (i) with . . . serious emotional disturbance, ...; and (ii) who, by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3)(A).

A "free appropriate public education" is defined as "special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) *meet the standards of the State educational agency*; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) *are provided in conformity with the individualized education program* required under section 1414(d) of this title." 20 U.S.C. § 1401(8) (emphasis added).

Minnesota accepts IDEA funds, and therefore, the children of Minnesota, including Christopher, are entitled to the free appropriate public education guaranteed by the IDEA.

The Eighth Circuit's decision poses at least two significant risks to children in future proceedings under the IDEA. First, the opinion may be cited as authority to immunize a school district from review of the appropriateness of an individualized education program, as long as the school can show the child has made some amount of academic progress, even where (as here) the individualized education program's approach actually causes the child's disability to worsen. Second, the Respondent District's punitive approach to disciplining Christopher, using increasing levels of isolation, time-outs, locked seclusion, and ultimately forcible removal from the school, in handcuffs, by the police, will be viewed as permissible, despite its violation of state educational standards.

I. THE EIGHTH CIRCUIT IMPROPERLY HELD THAT A CHILD WHO HAS MADE SOME ACADEMIC PROGRESS, REGARDLESS OF HOW INAPPROPRIATELY THAT CHILD'S DISABILITY WAS TREATED, HAS RECEIVED A FREE APPROPRIATE PUBLIC EDUCATION.

A. The Eighth Circuit holds that evidence of academic progress suffices to meet every element of a free appropriate public education.

Judge Bye's dissent concisely identifies the most troubling aspect of the Eighth Circuit majority's opinion. It "essentially holds the District can satisfy its duty to provide a [free appropriate public education] so long as a student with a *behavioral* disability makes *academic* progress." *CJN v. Minneapolis Public Schools*, 323 F.3d 630, 645 (8th Cir. 2003) (Bye, J. dissenting) (emphasis in original). By steadily repeating its mantra of "academic progress," the Eighth Circuit's majority opinion finds irrelevant the evidence that the District's approach to Christopher's third-grade education actually caused him to regress behaviorally, replacing his first and second grade behavioral progress with escalating outbursts that culminated in suicidal behavior.

The Eighth Circuit claims that it did not confine its analysis to Christopher's standardized test scores, yet in every instance, its reasoning circles back to reliance on academic progress as the sole basis for concluding that Christopher's abysmal third-grade experience in the Minneapolis public schools met the IDEA's requirement of a free appropriate public education.

For example, the majority views the district court's acknowledgement of Christopher's academic progress as

proof that his individualized education program was appropriately managing his behavioral problems. 323 F.2d at 638. The majority then notes that Christopher has "severe" behavioral difficulties, but again emphasizes that he "has always progressed academically at an average rate," concluding that his academic progress "demonstrates that his [individualized education programs] were not only reasonably calculated to provide educational benefit, but, at least in part, did so as well." *Id.* The majority repeats its equation of academic progress with a free appropriate education later on in its opinion, stating "the fact that [Christopher] is learning is significant evidence that his behavioral problems have, at least in part, been attended to." *Id.* at 642.

The majority opinion's single-minded focus on academic progress leads it to refuse to look behind Christopher's test scores to the propriety of the Respondent District's approach to Christopher's disability. While expressing "regret" at the way Christopher was treated, the Eighth Circuit holds that the type of treatment a disabled child receives is "irrelevant," so long as the child continues to show some academic progress. 323 F.3d at 639. "Thus, even assuming *arguendo* that more positive behavior interventions could have been employed, that fact is largely irrelevant." *Id.* In effect, the Eighth Circuit majority's opinion transforms the individualized education program into a black box, which the court will refuse to open, absent definitive proof that a child has stopped making academic progress.

B. The IDEA requires appropriate treatment of a child's disability as well as academic progress.

Every child entitled to benefits under the IDEA is entitled to receive an actual benefit under his or her

individualized education program that does not negatively impact his or her disability. That Christopher was learning within the average range on a standardized test is not determinative that his individualized education program was appropriate, particularly where the School District demonstrably failed to provide an adequate plan to address his undisputed emotional and behavioral disability. *See Board of Education of Hendrick Hudson Central School District, Westchester County vs. Rowley*, 458 U.S. 176, 201 n.23 (1982) (citing legislative history that handicapped children be enabled to achieve a reasonable degree of self-sufficiency).

This court's seminal decision in *Rowley* established that the predecessor statute to the IDEA requires more than just access to a public education for handicapped children. This Court carefully examined the intent of Congress and concluded that the statute was designed to provide a "basic floor of opportunity" for all disabled children, consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." 458 U.S. at 201. In support of this conclusion, this Court cited to the frequent references in the legislative history to Congress' goal of enabling handicapped children to "achieve a reasonable degree of self-sufficiency." *Id.* at n.23. Although the Court declined to interpret "self-sufficiency" as the substantive standard which Congress imposed upon the states through this legislation, the Court interpreted the self-sufficiency references as evidence that Congress intended the specialized, individually-tailored services provided under the legislation to be "educationally beneficial, whatever the nature or severity of [the child's] handicap." *Id.*

The *Rowley* opinion also emphasized that the statutory definition of a free appropriate public education cannot be disregarded. 458 U.S. at 188-89. That definition is not confined to a single parameter of measuring academic progress, but rather has four separate elements, all of which must be satisfied in order for a school to comply with the IDEA. 20 U.S.C § 1401(8)(A) – (D).

The Eighth Circuit's opinion substantially narrows the IDEA, by holding that evidence that a disabled child has made some academic progress is sufficient to prove compliance with all elements of the statutorily required free appropriate public education, regardless of whether the "specialized instruction and related services" provided to the disabled child are completely inadequate to address the child's admitted disability, and in fact have the effect of substantially worsening that disability.

C. Failure to look behind academic progress places disabled children at risk of inappropriate treatment of their disabilities.

The Eighth Circuit's willingness to ignore the way in which Christopher's behavioral problems deteriorated significantly in his third grade year, when he was faced with a teacher who refused to acknowledge his disability or to provide the individualized support services he needed to control his behavior, emphasizes the danger of the Eighth Circuit's interpretation of the IDEA. The school district's approach to Christopher's emotional disability in the third grade created a vicious cycle of escalating outbursts and increasing use of punitive measures (restraint, time-outs, and calling the police), ultimately culminating in this third-grade child attempting suicide. Under the Eighth Circuit's holding, the fact that an individualized education program causes a

child to become self-destructive is irrelevant, so long as that child continues to make academic progress.

As the Eighth Circuit itself acknowledged, the record here indicated that this student's behavioral problems, if unattended, might significantly curtail his ability to learn. 323 F.3d at 638. Undoubtedly, if this child's mother had left him in the situation to which he was subjected in his third grade year in the Minneapolis Public School system, his academic progress would have deteriorated. The fact that Christopher's mother refused to allow that to happen to her child, and promptly removed him from the Minneapolis public school system when she became convinced that the Respondent District was not going to take positive measures to address his escalating emotional disability, meant that she removed him from the adverse learning environment before his academic progress had significantly deteriorated. Surely the law does not require parents to leave a disabled child in an inappropriate educational environment long enough for the child's standardized test scores to suffer in order to establish that the child has not received a free appropriate public education.

D. The Eighth Circuit's holding conflicts with other circuits who recognize the broader requirements of the IDEA's definition of a free appropriate public education.

The Eighth Circuit's holding that all elements of the IDEA's definition of a free appropriate public education can be met solely by evidence that a student has made academic progress conflicts with the decisions of other circuits, who have taken a broader view of the IDEA's requirements. For example, the First Circuit, in *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990), *cert. denied,*

499 U.S. 912 (1991), held that "purely academic progress . . . is not the only indicia of educational benefit implicated either by the Act or by state law." Likewise, the Fifth Circuit in *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998), identified four factors that must be analyzed to determine whether an individualized education program complies with the IDEA, including that both "positive academic and non-academic benefits are demonstrated." Similarly, the Ninth Circuit in *Seattle School District, No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996), noted that standardized test results are "not the sine qua non of 'educational benefit,'" for purposes of the IDEA. Instead, citing the legislative history, the Ninth Circuit concluded that educational benefit must be broadly construed to include the handicapped child's academic, social, health, emotional, communicative, physical and vocational needs. *Id. See also Clevenger v. Oak Ridge School Board*, 744 F.2d 514, 516 (6th Cir. 1984) (an individualized education program that focused solely on educational issues and failed to account for a disabled child's emotional disturbance and inability to cooperate with authority did not satisfy the IDEA).

In *Rowley*, this Court cautioned against setting up academic progress as the sole measure for compliance with the IDEA's predecessor statute. "[W]e do not hold today that every handicapped child that is advancing from grade to grade in a regular public school system is automatically receiving a 'free appropriate public education.'" 458 U.S. at 203 n.25. The Eighth Circuit, in contrast to the First, Fifth, and Ninth Circuits, has now reached a holding that does equate academic progress alone with a free appropriate public education. The conflict between the Eighth Circuit's restrictive view of the IDEA's definition of a free appropriate public education and the broader views of other circuits raises

an important question, explicitly left unresolved in *Rowley*, that this Court should resolve.

II. THE CHILD'S INDIVIDUALIZED EDUCATION PLAN FAILED TO COMPLY WITH THE IDEA'S REQUIREMENT THAT A FREE APPROPRIATE PUBLIC EDUCATION MUST MEET STATE EDUCATIONAL STANDARDS.

As this Court recognized in *Rowley*, the statutory definition of a "free appropriate public education" has four elements, the second of which requires the school's special education and related services for each child to "meet the standards of the state educational agency." 20 U.S.C. § 1401(8)(B). The Eighth Circuit acknowledged that state educational standards are enforceable through the IDEA, but proceeded to refuse to enforce them, dismissing all of the demonstrated violations of state standards as "minor 'procedural and technical deficiencies'" that could not support a claim under the IDEA. 323 F.3d at 639.

Minnesota state law strictly regulates the kind of punitive and aversive measures that the Respondent District employed to address Christopher's behavioral disability in his third grade year. Minn. Stat. § 121A.67(1) requires the state to adopt rules that must "promote the use of positive approaches and must not encourage or require the use of aversive or deprivation procedures." In addition, any planned use of aversive or deprivation procedures must "be a part of an individual education plan." Minn. Stat. § 121A.67(2). Minnesota's rules, in turn, "encourage the use of positive approaches to behavioral interventions" and require all behavioral interventions to "focus on skills acquisition rather than merely behavior reduction or elimination." Minn. Rules § 3525.0850.

Christopher's individualized education program did not contain any planned use of aversive or deprivation procedures, and his previous experience in first and second grade had shown the time-out approach to be unsuccessful in addressing his disability. 323 F.3d at 645. Nevertheless, time-outs, restraints, and even police intervention, were regularly used on Christopher from the beginning of his third grade year. The Eighth Circuit dismissed that as a technicality, focusing on the fact that no formal "behavioral intervention plan" was adopted for his third grade year because his mother disagreed with the proposal. 323 F.3d at 640.

What the Eighth Circuit ignored is that Minnesota law specifically permits parents to object to any behavioral intervention plan that would require or countenance such negative actions toward the child. Minn. Rules § 3525.2900, subp. 5(E) (parent has the right to withdraw consent for a behavior intervention plan at any time). To the extent that such measures continued to be employed regularly without parental consent established beyond dispute that Minnesota's state standards were not followed in Christopher's case. By definition, therefore, Christopher was not afforded a free appropriate public education as defined in 20 U.S.C. § 1401(8)(B).

The danger of failing to require Minnesota's schools to adhere to state educational standards is particularly acute for the disadvantaged children CLC serves. Minnesota has recently begun to keep statistics on the number of reports of abuse for children with disabilities subjected to aversive and deprivation procedures as a way to control their behavior in Minnesota's schools. Since 1999, when the Maltreatment of Minors Program at the Minnesota Department of Children Families and Learning (recently renamed as the Department of Education) started to keep statistics, forty percent of the

596 reports of maltreatment made to the Department alleged that disabled students are subject to child abuse by the improper use of aversion and deprivation techniques. Indeed, while Minn. Stat. § 121A.67 permits the "planned application of aversive and deprivation procedures [that are] part of an individual education plan," such procedures that are not authorized are reportable as physical abuse under Minn. Stat. § 626.556.

The Eighth Circuit's decision in this case puts Minnesota in the anomalous position of permitting schools to claim that they have provided a free appropriate public education through the use of unauthorized and inappropriate aversive and deprivation techniques on students with disabilities – even where those same behavioral techniques would otherwise be criminal under Minnesota state law.

Even though the Eighth Circuit pays lip service to the statutory definition and case law holding that a failure to meet state educational standards constitutes a denial of the free appropriate public education required by the IDEA, the substantive effect of its decision to ignore state standards as minor technicalities creates a conflict with other circuits that have enforced state standards as substantive requirements through the IDEA. *See, e.g., Board of Education of East Windsor Regional School District v. Diamond*, 808 F.2d 987, 992 (3rd Cir. 1986); *David D. v. Dartmouth School Committee*, 775 F.2d 411, 420 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986). The Eighth Circuit's erroneous interpretation of the IDEA to permit school districts to ignore their own state educational standards provides another compelling reason to grant the Petition.

CONCLUSION

For the above-stated reasons, *Amicus Curiae* Children's Law Center of Minnesota respectfully submits that compelling reasons support granting the petition of Christopher and Sharon Nygren for a writ of certiorari in this matter.

October 6, 2003

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